FILE COPY

FILED
DEC 31 1947

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1947

No. 484

Lewis Johnson, Le Goode, Paul MacFarland and Town of Lacona, a municipal corporation

Petitioners

v.

Charles E. Sellers, L. R. Olmstead, Herman Aaldura, Lester Newman, Richard Dickey and Willard Moore

Respondents

Respondents' MEMORANDUM IN OPPOSITION to Petition for Writ of Certiorari to United States Circuit Court of Appeals for the Eighth Circuit

HAYDEN C. COVINGTON
Counsel for Respondents

INDEX

Cases Cited

	PAGE
Bridges v. California 314 U. S. 252	2
Chase National Bank v. Citizens Gas Co. 113 F. 2d 217 (CCA-7)	7
Cline v. Frink Dairy Co. 274 U. S. 445	7
Craig v. Harney 67 S. Ct. 1249	2
Douglas v. Jeannette 319 U. S. 157, 164	5, 6-7
Fidelity & Deposit Co. v. Tafoya 270 U. S. 426-434	7
Greene v. Louisville & I. R. Co. 244 U. S. 449, 506-507, 520-521	7
Hague v. C. I. O. 101 F. 2d 774 (CCA-3)	6
Hague v. C. I. O. 307 U. S. 496, 501-505, 506	5, 6-7
Hamilton v. Regents 293 U. S. 245, 257-258	4
Jamison v. Texas 318 U. S. 413, 414-415	4
Moore v. Fidelity & Deposit Co. 272 U. S. 317	7
Pennekamp v. Florida 328 U. S. 331	2
Pierce v. Society of Sisters 268 U. S. 510, 535, 536	7
Sellers v. Johnson 69 F. Supp. 778	3

CASES CITED *continued*

	PAGE
Sellers v. Johnson	
163 F. 2d 877 (CCA-8)	4
Sterling v. Constantin	
287 U. S. 378, 391, 394	2, 7
Terrace v. Thompson	
263 U. S. 197	7
United Public Workers of America v. Mitchell	
67 S. Ct. 555	7
United States Galvanizing & Plating Equipment Corp. v. Hanson-Van Winkle Munning Co.	
104 F. 2d 856 (CCA-4)	7-8
Young, Ex parte	
209 U. S. 123, 162-165	7

STATUTES CITED

Code of Iowa, 1946, Chapter 370	4
Code of Iowa, 1946, Chapter 389	3, 4

MISCELLANEOUS CITATIONS

Borchard, *Declaratory Judgments*, 1941, pp. 438-444	8

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1947

No. 484

□

Lewis Johnson, Lo Goode, Paul MacFarland and Town of Lacona, a municipal corporation

Petitioners

v.

Charles E. Sellers, L. R. Olmstead, Herman Aalders, Lester Newman, Richard Dickey and Willard Moore

Respondents

□

Respondents' MEMORANDUM IN OPPOSITION to Petition for Writ of Certiorari to United States Circuit Court of Appeals for the Eighth Circuit

MAY IT PLEASE THE COURT:

This case presents important questions concerning a grave denial by petitioners of respondents' civil liberties. However, the questions have previously been decided by this Court in favor of respondents and against the petitioners. The decision of the court below is in accord with the former decisions of this Court. There is no conflict.

The court below has not departed from any principle or applicable rule of law established by this Court for maintenance of the balance between the police power of the state and the orderly exercise of civil liberties by the free people of the United States.

In addition to the brief observations made below, the opinion of the court of appeals is here adopted and submitted in opposition to the petition for writ of certiorari. The opinion and facts stated therein show that there was no clear and present danger which justified the extreme steps taken by petitioners. (See the record [266-269] printed and accompanying the petition.) As to 'clear and present danger', the decision of the court below is in accord with *Craig* v. *Harney,* 67 S. Ct. 1249; *Pennekamp* v. *Florida,* 328 U. S. 331; *Bridges* v. *California,* 314 U. S. 252.

On the point of clear and present danger the attention of the Court is called to the opinion of Mr. Chief Justice Hughes in *Sterling* v. *Constantin,* 287 U. S. 378. In that case Governor Sterling of Texas declared martial law in the east Texas oil fields and put the production of oil under his supervision pursuant to executive order. There was much evidence that a civil war, violence, bloodshed and anarchy would immediately result in the oil fields if proration was not enforced in a proper manner by the governor. Reports of clear, present and immediate danger were brought to the attention of the governor. (287 U. S. at p. 391) He relied upon the general laws of Texas in respect to breach of the peace and unlawful assembly as justification for the extreme measures taken by him. (*Ibid.* p. 394)

The petitioners make a ridiculous contention, which was adopted by the district court, but rejected by the court of appeals, that the unconstitutional regulation of the Town of Lacona had no criminal sanctions and, since no prosecutions were instituted in the courts of Iowa against respondents because of their use of the park contrary to the void regulation, the regulation was inconsequential

to the rights of the parties. Because of these facts the petitioners contend that there was no interference with respondents' civil liberties through any legal process, therefore the regulation was inconsequential.

The district court in its memorandum decision attempted to side-step the constitutional issue in the case by stating that the actions of the petitioners under the regulation "were slight and inconsequential" under the facts shown. [240] In his findings he said that the resolution "did not carry any enforcement clause." In his conclusions the judge of the district court found that the resolutions "were not sufficient and are too inconsequential to warrant a federal court of equity in restraining" them. [248]

In his memorandum the judge of the district court said: "Neither the mayor nor the sheriff . . . tried to enforce this resolution." [240] This statement of the court is not only unsupported by the facts and the record but is contrary to the undisputed evidence.

The record shows that the city attorney, the sheriff and the county attorney discussed the matter of the enforcement of the resolution with the mayor. [32-33, 67]

The second resolution commanded the mayor to serve notice on the respondents "that the town council have prescribed Rules for the use of the public park in Lacona" and that the holding of meetings in the park without permission of the council would be "deemed an unlawful act and be punished as such." [32] Thereupon the mayor and town council handed to the sheriff the written notice to serve upon respondents. [67] The sheriff served the notice. [68]

The notice stated that pursuant to Chapter 389 of the 1946 Code of Iowa and the city ordinance and resolutions thereunder, the town of Lacona "has prescribed rules for the use of the public park in Lacona by groups holding meetings, and that you have not complied therewith and obtained permission to use the park." [33-34] In such notice Jehovah's witnesses were informed that the use of the park

without permission would be "deemed an unlawful act and be punished as such." [34]

The court of appeals said: "We do not agree with the District Court that the resolutions of the Town Council, adopted to prevent the Jehovah's witnesses from using the park without a permit, were inconsequential. The resolutions obviously were passed to establish a basis for treating the Jehovah's witnesses as law violators and to justify barring them from the park." [270]

Chapter 389 of the 1946 Code of Iowa confers authority upon the council of Lacona to control the park and such chapter, as well as Chapter 370 of the 1946 Code, also confers authority upon the courts of Iowa to prosecute persons violating the resolutions of the cities of Iowa passed in respect to their parks and public grounds. Therefore the repeated statements of petitioners about the regulation's not being a consequential law, are contrary to law and fact.

It may be a rule of criminal law of some states that an ordinance without sanctions is no ordinance at all for the purpose of prosecution. But under the federal Constitution and the federal Judicial Code it is not necessary for an ordinance, resolution, bylaw or motion to have penal provisions or sanctions in it. Any motion, order, rule, resolution, bylaw or ordinance that is promulgated by the state or one of its subdivisions is considered, under federal law, to be a state statute or state law. *Hamilton* v. *Regents,* 293 U. S. 245, 257-258. See also *Jamison* v. *Texas,* 318 U. S. 413, 414-415.

It is conceded that no effort has ever been made or threatened to be made to prosecute respondents for their use of the park contrary to Chapters 370 and 389 of the Code. The whole controversy in this lawsuit is over the means employed by petitioners Mayor Lo Goode and Sheriff Johnson to enforce the regulation which was by forcibly and unlawfully barring respondents from the park and the town of Lacona. Their method is clearly unconstitutional

and in violation of every rule of law and decency in a democratic republic, like America, dedicated to the four freedoms.

In *Douglas* v. *Jeannette,* 319 U. S. 157, denial of injunction was based upon the fact that it did not appear from the record that petitioners had been threatened with any injury other than that incidental to any criminal proceeding brought lawfully and in good faith, or that a federal court of equity by withdrawing the determination of guilt from the state courts could rightly afford petitioners any protection which they could not secure by prompt trial and appeal pursued to this Court. *Douglas* v. *Jeannette,* 319 U. S. 157, 164.

The rule established which requires federal courts to keep hands off the enforcement of unconstitutional state statutes is confined to instances where criminal proceedings are being prosecuted. Here the evidence shows no criminal proceedings have been threatened or instituted.

The facts in this case can be distinguished from those in the *Douglas* case and all the other cases where federal injunctions have been denied to Jehovah's witnesses and other persons seeking to enjoin the enforcement of unconstitutional state statutes.

This case falls squarely within the rule announced in *Hague* v. *C. I. O.,* 307 U. S. 496. There the city officials, after denying a permit to use the park, forcibly removed plaintiffs from the park and deported them from Jersey City. Here petitioners forcibly barred and blockaded Jehovah's witnesses from Lacona and forcibly prevented their entering the town or park for the purpose of holding meetings in the park. The facts of the denial of the use of the park here are identical with those in connection with denial of use of the park in the *Hague* case. There Jersey City had an ordinance prohibiting use of the park without a permit from the director of public safety. (307 U. S. 496, 502, note 1) There, as here, the permit was denied because

it was felt the speakers were so unpopular with inhabitants of the city that if they were permitted to speak in the park violence would result. After denial of the permit at Jersey City the speakers were barred from the park, just as the speakers and their audience were barred from the park at Lacona. The difference in the means employed in the two cases to keep the speakers and audiences out of the park does not distinguish the *Hague* case from this case. There is no difference between barring one from the park by forcibly ejecting him and by forcibly denying him the right to enter it. In both cases the citizen has been barred and denied the right to enter the park. See the discussion of the facts in the opinion of this Court in *Hague* v. *C. I. O.*, 307 U. S. 496, 501-505, 506. See also the more extensive statement of the facts, ordinances and activity appearing in the opinion of Biggs, C. J. (CCA-3) 101 F. 2d 774. The dissenting opinion of Judge Davis in the Third Circuit Court of Appeals in the *Hague* case quotes the letters of protest and other evidence on which denial of the permit to use the park was based. He also adverts to the threatened mob violence, which is the same in this case. In that case the director of public safety, as justification for his denial of the use of the park, said: "On the evening of December 28, 1937, a great mass meeting was held in the Armory at Jersey City, attended by over three thousand persons, all of whom were veterans. . . . Violent disorder was threatened on the part of the veterans in case the meeting was held. Announcements were made from the floor—and these announcements had the approval of the meeting—that if I should refuse to honor the Veterans' protest and grant a permit for the meeting, the Veterans would take the matter into their own hands and see to it that the meeting would be broken up."

Mr. Chief Justice Stone, in *Douglas* v. *Jeannette*, 319 U. S. 157, distinguished the *Douglas* case from the *Hague* case on the ground that the *Hague* case was "where local

officials forcibly broke up meetings of the complainants and in many instances forcibly deported them from the state without trial." (319 U. S. at 164) In the case at bar respondents have been treated in the same manner as were plaintiffs in the *Hague* case. Here the respondents have not had a trial in the state courts of Iowa because of their alleged illegal use of the park. Respondents have been barred entirely from the park, in the same way as were plaintiffs in the *Hague* case.

It was the *ultra vires,* illegal action of the officials in the *Hague* case, in depriving plaintiffs of the use of the park without invoking the criminal process of the state courts, which gave rise to the right to the injunction against the officials of Jersey City. Here it is also the unauthorized, illegal actions of petitioners, in barring (without resort to the courts of Iowa) respondents from the park, which gave rise to the jurisdiction of the court to grant the injunction, all of which distinguishes this case from the *Douglas* case for each and every one of the reasons that the Chief Justice distinguished the *Hague* from the *Douglas* case.[1]

Insofar as equitable relief was proper, the above references to the *Hague* case and the *Sterling* case are sufficient. But complaint is made of the order of the court retaining jurisdiction. Since this was a proper declaratory judgment action (See *United Public Workers of America* v. *Mitchell,* 67 S. Ct. 555.) it was proper to retain jurisdiction for supplemental relief. *Chase National Bank* v. *Citizens Gas Company* (CCA-7) 113 F. 2d 217; *United States Galvanizing & Plating Equipment Corp.* v. *Hanson-Van Winkle Mun-*

[1] In unusual circumstances even enforcement of state criminal statutes, taxation statutes and other statutes may be enjoined by federal injunction. Cline v. Frink Dairy Co., 274 U. S. 445; *Ex parte* Young, 209 U. S. 123, 162-165; Pierce v. Society of Sisters, 268 U. S. 510, 535-536; Greene v. Louisville & I. R. Co., 244 U. S. 449, 506-507, 520-521; Sterling v. Constantin, 287 U. S. 378, 393, 403-404; Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426-434; Moore v. Fidelity & Deposit Co., 272 U. S. 317; Terrace v. Thompson, 263 U. S. 197.

ning Co. (CCA-4) 104 F. 2d 856. See also Borchard, *Declaratory Judgments*, 1941, at pages 438-444.

Wherefore, the petition for the writ of certiorari should be denied because the decision of the court below is plainly right and in accord with the decisions of this Court and there is no substantial federal question which has not been decided but which should be decided by this Court.

HAYDEN C. COVINGTON
Counsel for Respondents